Supreme Court, U.S.
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No. 95-91

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1995

STANLEY JUSTIN BERKELEY,
Petitioner

v.

COMMONWEALTH OF VIRGINIA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE VIRGINIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was petitioner denied due process when the court of appeals found sufficient evidence to support a felony murder conviction with abduction as the underlying felony notwithstanding the fact that: (1) the jury was instructed it could convict only if it found that the murder had occurred during the commission of a rape; and (2) there was no evidence to support the jury's guilty verdict?

2. Was petitioner denied due process when the trial judge denied him the right to introduce evidence that a codefendant had pleaded guilty and admitted committing a capital murder, and petitioner's jury was permitted to infer that petitioner committed the murder despite the prosecution conceding outside the jury's presence that the codefendant had committed the crime?

3. Was petitioner's Fifth and Fourteenth Amendment privilege against self-incrimination violated when statements made by petitioner during booking were admitted even though petitioner, having previously been given Miranda warnings, specifically invoked his right to counsel, petitioner indicated after several sentences that he assumed any statements were confidential as part of the booking process, and the Commonwealth presented no evidence that petitioner had knowingly and intelligently waived his right to have counsel present before talking about the crimes charged?

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OPINIONS BELOW

The unreported decision of the Virginia Court of Appeals denying a petition for review on the second and third questions presented in this petition was entered on May 14, 1993. It is set forth in the Appendix at A-42. The 2-1 decision of the Virginia Court of Appeals finding sufficient evidence to support a murder conviction was entered on November 29, 1994. It is set forth in the Appendix at A-2, and is reported at 19 Va. App. 279, 451 S.E.2d 41. The unreported decision of the Virginia Supreme Court denying review was entered April 17, 1995. It is set forth in the Appendix at A-1.

JURISDICTION

This Court has jurisdiction to entertain this petition for certiorari pursuant to 28 U.S.C. § 1257. The petition is filed in a timely manner

under Rule 13.1 of the Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS

Petitioner relies upon the following constitutional provisions:

U.S. Constitution, Amendment V:

. . . [N]or shall any person . . . be compelled in any criminal case to be a witness against himself . . . .

U.S. Constitution, Amendment XIV:

. . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

Petitioner accepts as accurate the statement of facts by the Virginia Court of Appeals in its November 29, 1994 opinion, set forth in the Appendix at A-2. Petitioner's statement of the case summarizes the key facts set forth by the Virginia Court of Appeals.

On July 9, 1991, Melissa Harrington (the victim) was abducted in the early morning from the parking lot of the apartment complex where she resided. No one actually witnessed the abduction, and no witnesses could identify the abductor. The police, having reason to suspect Andrew Chabrol of the abduction, went to Chabrol's house, were admitted, and found both Chabrol and petitioner present. For several hours the police stayed on the premises and sporadically questioned Chabrol and petitioner. In response to police questioning, Chabrol and petitioner gave conflicting versions of their activities. After Chabrol refused a police request for permission to search the house, police obtained a search warrant. They searched the house and found the victim's nude, dead body on the floor of the master bedroom. She had been killed by Chabrol.

Upon discovery of the body, the police arrested both Chabrol and petitioner. Petitioner was given Miranda warnings, and clearly and unmistakably invoked his right to counsel. Thereafter, while being booked, petitioner stated to the officer conducting the booking that he "was a victim of circumstances," and, according to the officer, petitioner added the following:

> He stated he was only here on vacation. He stated during the abduction he could only drive the car in which they picked her up due to his limited ability. He said he f----- her but on the second time he could not bring himself to do it.[1]

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1. Page 280 of the trial transcript, which is also page 150 of the Joint Appendix filed in the Virginia Court of Appeals.

   Petitioner made additional statements which the trial judge suppressed. Transcript of hearing on motion to suppress dated March 12, 1992, page 3.

Vaginal swabs were taken from the victim and were subjected to analysis. DNA testing of sperm found in the victim was consistent with petitioner's DNA and inconsistent with that of Chabrol and the victim's husband. The likelihood that the DNA came from a male other than petitioner was small.

Petitioner was originally charged with capital murder under Virginia Code Section 18.2-31. The original indictment alleged that the killing occurred "during the commission of, or subsequent to, rape." The Commonwealth moved, however, prior to trial that the indictment be amended to charge a violation of Virginia Code Section 18.2-32 and to delete the quoted words. Thus, as the Commonwealth presented its evidence, the indictment simply charged petitioner with murder.

At the close of the Commonwealth's case, petitioner moved to strike the

evidence as insufficient. At that time, the Commonwealth again moved to amend the indictment, this time to add the phrase "in the commission of rape or abduction." (See App. A-10) Petitioner consented to this amendment when the Commonwealth agreed that it would "give up any claim . . . to concert of action."

The indictment, following the second amendment, read as follows:

The Grand Jury charges that:

> On or about July 9, 1991, in the City of Chesapeake, Virginia, the accused, STANLEY JUSTIN BERKELEY, did maliciously kill and murder Melissa Harrington, in the commission of rape or abduction, in violation of Section 18.2-32 of the Virginia Code.

The two amendments to the indictment followed the guilty plea of Chabrol to capital murder. Chabrol was sentenced to death. See Chabrol v. Commonwealth, 245

Va. 327, 427 S.E. 2d 374 (1993). He has since been executed.

As part of the defense case at trial, petitioner sought to offer into evidence Chabrol's guilty plea to show that Chabrol had admitted that he killed the victim and that the Commonwealth had accepted his admission as accurate.[2] The trial judge -- the same trial judge who took the plea from Chabrol -- excluded the evidence.[3]

The jury found petitioner guilty of abduction with intent to defile, rape, and first degree murder. The trial

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2. This evidence was enormously important after the Commonwealth moved for the second amendment to the indictment and stipulated that it would not rely upon a concert of action theory to convict petitioner. The Commonwealth's stipulation required that it prove guilt by showing petitioner affirmatively acted, and not by showing that petitioner was tangentially guilty because the joint actor Chabrol committed the murder.

3. The Virginia Court of Appeals recognized that, without the guilty plea of Chabrol, the record in petitioner's trial would not have permitted any trier of fact or a reviewing court to know whether the murder was committed by petitioner, Chabrol or both men. See App. A-12 n.4.

judge, relying upon the jury's recommended sentences, imposed three life sentences on petitioner. The Virginia Court of Appeals affirmed, 2-1, with one judge arguing in dissent that the Commonwealth, as a result of its stipulation that it would not rely upon a concert of action theory, had no evidence to prove that petitioner was guilty of murder. The Virginia Supreme Court denied review.

ISSUES RAISED BELOW

Petitioner sought to strike the evidence as insufficient at the close of the Commonwealth's evidence, renewed the motion at the close of all the evidence, filed a post-trial motion in the trial court, and consistently urged on appeal that there was no evidence to support the jury's verdict. Petitioner objected at trial and on appeal to the exclusion of Chabrol's guilty plea. Petitioner moved

prior to trial to suppress the statement he made during booking, and challenged the admissibility of the statement on appeal.[4]

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4. Prior to trial, petitioner filed a motion to suppress a number of evidentiary items. Paragraph 4 of the motions set forth the following allegation:

> 4. That [in] violation of the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Article I, Section 8 and 11 of the Virginia Constitution, agents of the Commonwealth questioned Defendant in contravention of his rights under Miranda and the Constitution and failed to honor the Defendant's request for his attorney prior to questioning.

The trial judge conducted a suppression hearing prior to trial. As a result of that hearing, petitioner's counsel persuaded the judge to suppress the statements that petitioner made during booking after he asked whether his statements would be in strict confidence and was assured that they would. Petitioner's counsel successfully urged that, following this assurance, petitioner was effectively being interrogated without having been warned of his rights. In admitting the statements petitioner made before asking for assurance about confidentiality, the judge did not rule on petitioner's claim that the Commonwealth "failed to honor the Defendant's request for his attorney." Although defense counsel did not raise the issue artfully, he attempted to articulate the point that petitioner never waived his right to counsel at any time.

REASONS FOR GRANTING THE WRIT

1. Petitioner was denied due process when the court of appeals found sufficient evidence to support a felony murder conviction with abduction as the underlying felony notwithstanding the fact that: (1) the jury was instructed it could convict only if it found that the murder occurred during the commission of a rape; and (2) there was no evidence to support the jury's guilty verdict. The Virginia Court of Appeals departed from the long line of cases decided by this Court that deny an appellate court the authority to affirm a conviction on a legal theory that was never presented to the jury.

2. Petitioner was denied due process when the trial judge denied him the right to introduce evidence that a codefendant had pleaded guilty and admitted committing a capital murder, and

petitioner's jury was permitted to infer that petitioner committed the murder despite the fact that the prosecution conceded outside the jury's presence that the codefendant had committed the crime. The Virginia Court of Appeals ignored this Court's decision in Green v. Georgia, 442 U.S. 95 (1979), and its decision is in conflict with the decisions of several federal circuits that have decided similar issues.

3. Petitioner's Fifth and Fourteenth Amendment privilege against self-incrimination was violated when statements made by petitioner during booking were admitted even though petitioner, having previously been given Miranda warnings, specifically invoked his right to counsel, petitioner indicated after several sentences that he assumed any statements were confidential as part of the booking process, and the

Commonwealth presented no evidence that petitioner had knowingly and intelligently waived his right to have counsel present before talking about the crimes for which he was charged. As indicated by the facts of this case, there is confusion about the relationship of this Court's bright-line rule of Edwards v. Arizona, 451 U.S. 477 (1981), and its progeny, and the "booking exception" to the privilege against self-incrimination recognized by a plurality of the Court in Pennsylvania v. Muniz, 496 U.S. 582 (1990). Moreover, there is conflict among lower courts as to whether the prosecution must show that a suspect who has invoked his right to counsel after being given Miranda warnings has waived his rights when a statement is made to police before the suspect has been provided counsel.

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

1. The record in this case is absolutely clear that the jury was instructed by the trial judge on the elements of felony murder as follows:

> The Court instructs the jury that the defendant is charged with the crime of first degree murder. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime. One, that Melissa Harrington was killed, two, that the killing was malicious, and, three, that the killing **occurred in the commission of rape in which the defendant participated.** (Emphasis added)[5]

No objection was made to this instruction, and it is the only jury instruction which specifies the elements of first degree murder. The prosecutor made no reference in argument to the jury about the murder occurring in the course

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5. The instruction is found at page 371 of the trial transcript, which is also page 220 of the Joint Appendix filed in the Virginia Court of Appeals.

of abduction; he argued only about murder in the course of rape. At no time did the prosecutor ask the judge to modify the instruction quoted above.

Thus, it is indisputable, as the dissenting judge in the Virginia Court of Appeals specifically observed, that the jury was restricted in its deliberations concerning murder to deciding whether the murder occurred during the course of a rape. The dissenting judge also noted that the majority's holding "that victim's murder stemmed from the commission of the felony of abduction" violated due process because "[t]his reasoning improperly premises Berkeley's criminal liability upon a theory that was not submitted to the jury."[6]

The record does not reveal why the trial judge limited the jury's consideration to rape rather than to

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6. Dissenting Opinion of Judge Benton, App. A-29.

abduction or rape. During a hearing on the post-trial motion to set aside the convictions, the trial judge was reminded that the jury had been told that it had to find that the murder occurred in the commission of a rape and offered no explanation for his instruction.[7] The judge may have deemed the abduction to be too remote in time, or he may have decided that the murder was not part of the abduction. Whatever his reasoning, the trial judge never instructed the jury on the legal theory which served as the basis of the majority opinion in the Virginia Court of Appeals.[8]

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7. See Joint Appendix in Virginia Court of Appeals, at 260.

8. The trial judge might well have made a last minute decision to limit the jury's consideration to murder committed in the course of rape. He defined for the jury the term "in the course of abduction" as well as "in the course of rape," but clearly limited the felony murder instruction to rape. In view of the prosecutor's closing argument, the prosecutor appears to have abandoned any reliance on murder in the course of abduction. This abandonment may have become clear to the trial judge late in the trial.

The dissenting judge in the Virginia Court of Appeals was correct. The holding below violates a long line of cases decided by this Court. See, e.g., Cole v. Arkansas, 333 U.S. 196, 201-202 (1948) (violation of due process when defendant's convictions were affirmed on grounds other than those charged to and tried before jury); McCormick v. United States, 500 U.S. 257, 270 n.8 (1991) ("This Court has never held that the right to a jury trial is satisfied when an appellate court retries a case on appeal under different instructions and on a different theory than was ever presented to the jury."). See also Ortiz v. Dubois, 19 F.3d 708, 716 (1st Cir. 1994) ("...if the prosecution decides to submit a case to the jury on one of two equally valid legal theories, and the jury convicts despite insufficient evidence, on appeal the court cannot

resurrect the conviction by ruling that there was sufficient evidence to convict on the alternative theory."), cert. denied, __ U.S. __, 115 S. Ct. 739 (1995).

Given the jury instructions administered by the trial court, the Commonwealth was obliged to establish that the victim had been killed during "the Commission of rape in which the defendant participated."[9] Having abandoned a concert of action theory, the Commonwealth could produce no such evidence. The victim was not killed in the commission of a rape by petitioner; the victim was killed by Andrew Chabrol, who confessed his crime to the Commonwealth and to the court.[10] Hence,

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9. The instruction is found at page 371 of the trial transcript, which is also page 220 of the Joint Appendix filed in the Virginia Court of Appeals.

10. In Chabrol v. Commonwealth, 245 Va. 327, 331 (1993), the Virginia Supreme Court noted that (continued...)

the Virginia Court of Appeals could not affirm petitioner's murder conviction on the ground submitted to the jury and instead affirmed on an entirely different theory, that the victim had been killed "within the res gestae of the abduction."[11]

Moreover, if the murder conviction is set aside, petitioner has a strong argument for a new sentencing hearing. The jury that returned a recommendation of three life sentences was treating petitioner as a convicted murderer. As the trial judge instructed the jury, it had discretion to recommend a sentence for the rape conviction from five years to life imprisonment, and for the abduction conviction from twenty years to life imprisonment. Since the jury's

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10. (...continued)
after killing the victim, Chabrol "ran out of the room and told [petitioner] that he had killed Harrington."

11. App. A-13. See also App. at A-19-21.

recommendations were made after it erroneously convicted petitioner of murder, there is every reason to believe that the murder conviction affected the sentencing recommendation on the other crimes.

2. Prior to petitioner's trial, Chabrol pleaded guilty to capital murder. The prosecution was aware of the plea and supported it, and the trial judge in petitioner's case was the same judge who had accepted the plea.[12] Thus, both the prosecution and the trial judge knew that Chabrol had killed the victim, and that

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12. The record in Chabrol's case indicates, "Chabrol pleaded guilty to capital murder in violation of Code § 18.2-31(5) (murder in the commission of, or subsequent to, rape). He also pleaded guilty to rape and abduction with intent to defile. Before accepting his guilty pleas, the trial court examined Chabrol and found that his pleas were made knowingly, voluntarily, and intelligently. Upon agreement of counsel and Chabrol, the court heard from the prosecutor a partial recitation of the Commonwealth's evidence. Thereafter, the court found Chabrol guilty of all three offenses, ordered a presentence investigation by the probation office, and scheduled a hearing for the penalty phase of the capital murder proceeding." 245 Va. 327, 328-29 (1993).

she had not been killed by petitioner in the course of a rape or otherwise. Notwithstanding this knowledge, and despite the prosecutor specifically agreeing not to seek a conviction for murder on a theory of concert of action, the prosecutor objected to admission of Chabrol's plea and the trial judge sustained the objection. As a result, the jury was left with the misleading impression that petitioner was the murderer, because his semen was found in the victim and there was no other evidence regarding the murder. The exclusion of evidence regarding Chabrol's plea denied petitioner a fair trial on the murder charge, and accounts for why the jury convicted him on the only theory submitted to it: i.e., the murder took place in the course of a rape.

There is no reasonable basis on which the guilty plea could have been

excluded. Chabrol was pleading guilty to capital murder, the Commonwealth was seeking the death penalty, and both Chabrol and the Commonwealth maintained that Chabrol was the killer. Moreover, the trial judge in petitioner's case was intimately familiar with the facts, since he had accepted Chabrol's plea.

Petitioner's trial counsel reasonably asked the trial judge to take judicial notice of Chabrol's plea of guilty to capital murder. He made this request after he learned that the Clerk's office had not yet completed the order incorporating the guilty plea into the Court's records. Petitioner's counsel had requested the order 10 days before trial. Faced with three readily available options -- (1) ordering the Clerk's office to prepare an order incorporating the guilty plea so that it could be offered as an exhibit, (2)

entering an order stating that Chabrol had pleaded guilty to capital murder, or (3) taking judicial notice of the guilty plea which the trial judge himself had accepted from Chabrol[13] -- the trial judge, without citing any authority for his ruling, stated the following:

> THE COURT: The jury can't take judicial notice. It will have to happen some other way. It can't happen by me taking judicial notice and a jury can't take judicial notice.

Transcript at 346.

Petitioner's trial counsel responded: "But the Court can, Judge." Transcript at 347.

The prosecutor, citing no authority, argued to the trial judge that he could not take judicial notice and that petitioner should be required to call Chabrol as a witness. The trial judge

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13. The trial judge stated "I already know it" to indicate that he was fully aware that Chabrol had pleaded guilty and admitted the murder. Trial transcript at 346.

ultimately agreed and concluded that he could not take judicial notice of the guilty plea, despite it being an undisputed fact of which he was personally aware. The judge said to petitioner's counsel, "If I take judicial notice the jury doesn't know anything about it." Transcript at 347.

This remarkable exchange denied petitioner a fair opportunity to prove undisputed facts that would have assured that the jury would not incorrectly assume he murdered the victim when his was the only DNA semen evidence found in her body. In making his ruling that he could not take judicial notice of undisputed facts which soon would be incorporated in official court documents, the trial judge denied petitioner the most important evidence of his innocence of murder.

By refusing to enter an order or have the Clerk enter an order incorporating Chabrol's guilty plea, and by also refusing to take judicial notice of the plea and instructing the jury of Chabrol's plea, the trial judge denied petitioner his chance to prove what no one disputed: Chabrol killed the victim; petitioner did not.

The authority of a trial judge to take judicial notice is recognized by Virginia courts. See, e.g., O'Dell v. Commonwealth, 234 Va. 672, 696 n.7, 364 S.E.2d 491, 505 (1988), cert. denied, 488 U.S. 871 (1988). Trial judges routinely take judicial notice when prosecutors do not object, and notice helps them as well as a defendant. See, e.g., James v. Commonwealth, 18 Va. App. 746, 442 S.E.2d 900 (1994) (judicial notice taken of a training manual).

The same Virginia Court of Appeals that held petitioner's rights were not violated when the trial judge refused to inform his jury that Chabrol had pleaded guilty to the murder has held that the preferred way for trial judges to deal with prosecutorial claims that a defendant has previously been convicted of a felony is to admit the record of the conviction and then take judicial notice of the punishment that qualifies the conviction as a felony. See Essex v. Commonwealth, 18 Va. App. 168, 171-72, 442 S.E.2d 707, 709 (1994). This procedure was the one petitioner sought to follow, except that he was faced with the fact that the Clerk's office had not yet prepared an order incorporating Chabrol's plea and the trial judge refused to take judicial notice as to the nature of the crime which Chabrol admitted.

In rejecting petitioner's fairness claim, the Virginia Court of Appeals has sanctioned a one-way street in which prosecutors are able to have trial judges take judicial notice of undisputed facts while defendants are barred from doing so, even when the trial judge is personally knowledgeable about the facts and those facts are unchallenged. This kind of one-way street is exactly what this court condemned in Washington v. Texas, 388 U.S. 14 (1967) (holding the compulsory process clause binding on the states and condemning an arbitrary state rule favoring the state). In petitioner's case, when the trial judge refused to take judicial notice and then failed to enter an order reflecting Chabrol's plea or to require the Clerk's office to prepare such an order, he denied petitioner all reasonable access to the undeniable fact that Chabrol

pleaded guilty to the murder charged to petitioner.

It was wholly unfair for the judge to require that petitioner call Chabrol as a witness. Neither petitioner nor his counsel had access to Chabrol, and petitioner had neither need nor desire to propound Chabrol and therefore vouch for Chabrol's credibility.[14] Petitioner wanted only to show that Chabrol had pleaded guilty to capital murder, and that the Commonwealth of Virginia supported his plea. The patent unfairness in excluding the plea from evidence is underscored by the prosecutor's stipulation that he would not rely upon a concert of action theory in exchange for petitioner's accepting a

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14. The trial judge assumed that Chabrol would testify, but the record contains no facts supporting this assumption. Moreover, petitioner indicated he had no objection to the prosecutor or the court attempting to call Chabrol and to take responsibility for him as a witness. Trial transcript, page 354.

second amendment of the indictment. Essentially, the prosecutor stipulated that petitioner could not be convicted except as a result of his own actions, and the trial judge then prevented petitioner from showing the jury that he did not kill the victim and that the DNA evidence did not relate to the identity of the murderer.

Had the guilty plea been incorporated in a court record, the record would have been admissible as a business record or an official record. Williams v. Commonwealth, 213 Va. 45, 46-47, 189 S.E.2d 378, 379-80 (1972). But, because the Clerk's office had not yet created the record, petitioner's counsel was forbidden from calling the plea to the attention of the jury. Implicitly, the trial judge treated the plea as inadmissible hearsay until it was incorporated in a record, and the judge

refused to obviate the hearsay problem by taking judicial notice. The hearsay nature of the ruling is demonstrated by the prosecutor's and trial judge's insistence that Chabrol testify to avoid the implicit hearsay problem.

The prosecution attempted to argue that Chabrol's guilty plea was not relevant. Such an argument might have had merit if the prosecutor had not abandoned his concert of action theory. Once he abandoned that theory, Chabrol's plea was the single most important piece of evidence concerning who committed the murder. The prosecutor relied upon Chabrol's guilt to obtain the death penalty that led to Chabrol's execution.[15] There is no reasonable argument that Chabrol's admitted guilt and

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15. In the statements made by petitioner to the police, petitioner indicated that Chabrol had been the sole murderer and that petitioner had expected Chabrol to release the victim, not kill her. Transcript of hearing on motion to suppress, dated March 10, 1992, page 27.

responsibility for murder would not have exculpated petitioner. By holding that petitioner could be denied access to this evidence and could be required to call Chabrol to the stand, the Virginia Court of Appeals denied petitioner due process and rendered a decision that is in conflict with this Court's opinion in Green and with a number of other federal decisions.

Federal courts consistently have looked to several factors in determining the admissibility of hearsay evidence of third-party guilt at trial. Green, 442 U.S. at 97 (focusing on adversity to penal interest and reliability); Rivera v. Director, Dept. of Corrections, 915 F.2d 280, 282 (7th Cir. 1990) (considering reliability of evidence); Perry v. Rushen, 713 F.2d 1447, 1452-53 (9th Cir. 1983) (requiring evidence to be highly relevant), cert. denied, 469 U.S.

838 (1983); Turner v. Armontrout, 845 F.2d 165, 169 (8th Cir. 1988) (mandating that evidence be unambiguously exculpatory), cert. denied, 488 U.S. 928 (1988). The presence of all these factors in this case leads directly to the conclusion that Chabrol's plea should have been admitted into evidence.

Denying petitioner the use of both the guilty plea and Chabrol's admission of murder was egregiously unfair under the circumstances. The prosecutor knew that Chabrol committed the murder and that petitioner did not, the prosecutor had stipulated that petitioner could not be convicted on the basis of Chabrol's actions, and the trial judge instructed the jury that it had to find that the murder occurred during a rape to convict petitioner. Because the DNA evidence implicated petitioner, not Chabrol, in rape, and because there was no evidence

as to who committed the murder, the jury was invited to conclude that petitioner committed the murder, even though the prosecutor and the trial judge both knew this was not the case. This is a violation of due process.

3. Petitioner unequivocally invoked his right to counsel after being informed of his Miranda rights. He thereby obtained the protections afforded by Edwards v. Arizona, 451 U.S. 477 (1981), and its progeny. This Court's post-Edwards decisions hold that, once an arrestee has invoked his right to counsel under Miranda, statements obtained while the arrestee is in custody are inadmissible unless (a) the suspect initiates any subsequent conversations, and (b) the prosecution shows that there is a waiver as to any interrogation that follows initiation of a conversation by

the arrestee. See, e.g., Oregon v. Bradshaw, 462 U.S. 1039 (1983).

The record establishes that petitioner did not initiate any conversation and did not speak after invoking his right to counsel until the booking process began. The record clearly indicates that petitioner never gave any indication that he intended to waive the right to have counsel present or that he intended to volunteer a statement that could be used against him. There is no doubt in this case that petitioner did not volunteer any information until he was placed in a "lock-up" for purposes of booking and confronted by the booking officer, Officer Kevin Kight. It was Officer Kight's utilization of the "classification sheet" that caused petitioner to speak about his crime.

A plurality of this Court concluded in Pennsylvania v. Muniz, 496 U.S. 582 (1990) (Brennan, J., joined by O'Connor, Scalia and Kennedy, JJ.), that Miranda does not apply to routine booking questions designed to secure necessary biographical data or to complete pretrial services, because routine questions are not intended to elicit information for investigatory purposes.[16] The Muniz plurality emphasized that, in deciding whether or not custodial interrogation occurs, a court must focus on the perspective of the suspect. In Muniz, the questions asked were limited to the arrestee's name, address, height, weight, eye color, date of birth and current age.

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16. Chief Justice Rehnquist, joined by Justices White, Blackmun and Stevens, concluded that Muniz's responses to the booking questions were not testimonial and therefore "do not warrant application of the privilege." The Chief Justice found it unnecessary to decide whether the questions asked fell within the routine booking exception recognized by Justice Brennan. Id. at 608.

Id. at 601. Moreover, in Muniz, the arrestee waived his Miranda rights when they were read to him. In the instant case, petitioner specifically invoked his right to counsel, and the booking officer used a "classification sheet" to question petitioner about charges that might be pending elsewhere and any "mental illness" he might claim.

The relationship of Edwards and Muniz has not been developed by this Court. Petitioner respectfully submits that Muniz will undermine the protections which this Court assumed would be provided by Edwards. After a suspect specifically indicates that he does not want to answer questions and wants the assistance of counsel, police should not then be free to use the booking process as a vehicle for compelling the suspect into talking after moving him from the place of arrest to the station house,

especially if the suspect assumes, as petitioner did, that the "booking" process is distinct from the investigatory process and that statements made therein cannot be used against him.[17]

Petitioner respectfully submits that, once he specifically invoked his right to counsel, the Commonwealth should have been required to show that he understood that any statements he made about the crime during the booking process could be used against him. This case illustrates how a suspect may be confused about the way in which the booking process relates to the invocation of the right to have counsel present during any interrogation. It is clear

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17. In this case, the prosecutor conceded that "I think it is a reasonable proposition that someone who has been advised of his rights and then makes an inquiry similar to the one Mr. Berkeley made might think that the advisement of rights not withstanding [sic] what he is now telling the sheriff's deputy will not be repeated." Transcript of hearing on motion to suppress dated March 10, 1992, at 46.

that petitioner was alone during the booking session with Officer Kight; petitioner stated that he "was a victim of circumstances," and thereafter petitioner uttered only three short sentences before something about the conversation caused petitioner to seek assurance that what he was saying was confidential.

The lower courts are divided on the extent to which the trial court must examine whether a defendant who makes a statement after invoking his right to counsel and thereby triggering Edwards has waived the right to counsel. The Courts of Appeals for both the First Circuit and the Ninth Circuit consistently follow the two-prong analysis of Bradshaw, requiring that defendant knowingly and voluntarily waive his right to counsel after initiating conversation, whether during booking or

not, and even with a specific finding that no interrogation occurred. See, e.g., Sheldelbower v. Estelle, 885 F.2d 570, 572-74 (9th Cir. 1989)(considering the validity of defendant's waiver of his right to counsel after finding he was not subject to interrogation), cert. denied, 498 U.S. 1092 (1991); United States v. Montgomery, 714 F.2d 201, 202-03 (1st Cir. 1983)(considering the validity of defendant's waiver where he initiated conversation after booking process).

Contrary to the analysis set forth in Bradshaw, the Court of Appeals for the Sixth Circuit concluded that volunteered statements made during booking are not the product of interrogation, thereby eliminating the need to consider whether the defendant knowingly and intelligently waived his right to counsel. United States v. Avery, 717 F.2d 1020, 1024-25 (6th Cir. 1983) (explicitly denying the

application of Bradshaw to the facts of the case), cert. denied, 466 U.S. 905 (1984).

Moreover, decisions within a single circuit are in conflict with respect to whether a trial judge must find waiver before admitting statements made by a defendant who has invoked his Edwards right to counsel. For instance, the Court of Appeals for the Fourth Circuit has held that, while booking questions do not constitute interrogation, an incriminating response to booking questions may be admitted without a showing of waiver. United States v. Taylor, 799 F.2d 126, 128 (4th Cir. 1986), cert. denied, 479 U.S. 1093 (1987). That court has considered the validity of a defendant's waiver, however, when a defendant volunteers statements during booking and thus initiates dialogue with law enforcement

officials after invoking his right to counsel. United States v. Morrow, 731 F.2d 233, 237 (4th Cir. 1984), cert. denied, 467 U.S. 1230 (1984).

Likewise, the Court of Appeals for the Tenth Circuit has developed two approaches to applying Bradshaw. If a defendant volunteers statements, that court holds that no interrogation has occurred and specifically declines to analyze whether the defendant has waived his right to counsel, unless "reinterrogation" occurs. United States v. De La Luz Gallegos, 738 F.2d 378, 380-81 (10th Cir. 1984), cert. denied, 469 U.S. 1076 (1984). If law enforcement officers engage in some conduct that requires a judicial determination of who initiated the dialogue, however, that court will look to the validity of a defendant's waiver of his right to counsel, even after a finding that he

initiated the contact. United States v. Comosona, 848 F.2d 1110, 1111-13 (10th Cir. 1988).

In denying petitioner the right to appeal the trial judge's failure to suppress his statement to Officer Kight, the Virginia Court of Appeals simply stated that petitioner "did not raise the issue that the statements made . . . were a product of custodial interrogation." App. A-46. But, petitioner's trial counsel did assert in his motion to suppress that the police "failed to honor the Defendant's request for his attorney prior to questioning." He added at the suppression hearing that petitioner never waived the right to counsel that he had asserted and that, absent waiver, the right to counsel remained in force.

To clarify the relationship between Edwards and Muniz and to instruct the lower courts which are in conflict on the

question whether a trial court must find a waiver of the right to counsel before admitting a statement which police obtain after Edwards is triggered, petitioner asks this Court to grant certiorari. Whether or not the questions asked during the booking process would amount to interrogation under other circumstances, petitioner suggests that, once an arrestee has specifically invoked the right to counsel, Edwards should be read to require that statements made during the booking process should be inadmissible unless the state can show that the arrestee knowingly and voluntarily waived the right to counsel at the time the statements were made.[18]

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18. If the statement made by petitioner to Officer Kight is excluded, there is no evidence to convict petitioner of abduction, and his conviction of abduction with intent to defile would have to be vacated. It appears that the physical evidence, including the DNA evidence, would remain sufficient to support a rape conviction, although the state courts would have to decide whether the erroneous admission of the statement to Kight was prejudicial with (continued...)

Petitioner clearly believed that, having invoked his right to counsel, nothing he said in response to the booking process could be used against him. The prosecutor agreed that this belief was reasonable under the circumstances.[19] Thus, the statements made by petitioner during booking should be excluded as having been obtained in violation of his privilege against self-incrimination.

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18. (...continued)
respect to the rape charge so that a new trial on that charge is required.

19. See footnote 9 supra.

CONCLUSION

For the reasons set forth herein, petitioner asks this Court to grant certiorari to review the three questions presented.

RESPECTFULLY SUBMITTED,

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Counsel for Petitioner

No. 95-

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1995

STANLEY JUSTIN BERKELEY,
Petitioner

v.

COMMONWEALTH OF VIRGINIA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE VIRGINIA SUPREME COURT

APPENDIX

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VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday *the* 17th *day of* April, 1995.

Stanley Justin Berkeley, Appellant,

against Record No. 942226
Court of Appeals No. 1680-92-1

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk

By:

Deputy Clerk

COURT OF APPEALS OF VIRGINIA

Present: Judges Baker, Benton and Bray
Argued at Norfolk, Virginia

STANLEY JUSTIN BERKELEY

v. Record No. 1680-92-1

COMMONWEALTH OF VIRGINIA

OPINION
BY JUDGE JOSEPH E. BAKER
NOVEMBER 29, 1994

FROM THE CIRCUIT COURT
OF THE CITY OF CHESAPEAKE
Russell I. Townsend, Jr., Judge

Stanley E. Sacks (Sacks, Sacks & Imprevento, on brief), for appellant.

Donald R. Curry, Senior Assistant Attorney General (Stephen D. Rosenthal, Attorney General, on brief), for appellee.

Stanley Justin Berkeley (appellant) appeals from a judgment of the Circuit Court of the City of Chesapeake (trial

court) that approved a jury verdict convicting him of first degree murder. The same jury convicted appellant of rape and abduction with intent to defile.

This appeal is limited to the first degree murder conviction for violation of Code § 18.2-32.[1] The dispositive question for our determination is whether the evidence is sufficient to sustain the first degree felony-murder conviction as charged in the final amended indictment. Upon familiar principles, we review the evidence in the light most favorable to the Commonwealth, granting to it all

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1. Code § 18.2-32, in effect at the time of these proceedings, provided as follows: Murder, other than capital murder, by poison, lying in wait, imprisonment, starving, or by any willful, deliberate, and premeditated killing, or in the commission of, or attempt to commit, arson, rape, forcible sodomy, inanimate object sexual penetration, robbery, burglary or abduction, except as provided in § 18.2-31, is murder of the first degree, punishable as a Class 2 felony.
All murder other than capital murder and murder in the first degree is murder of the second degree and is punishable as a Class 3 felony.

reasonable inferences fairly deducible therefrom. Higginbotham v. Commonwealth, 216 Va. 349, 352, 218 S.E.2d 534, 537 (1975). For the reasons that follow, we affirm the conviction.

On July 9, 1991, at approximately 6:20 a.m., Melissa Harrington (victim) was abducted by appellant and Andrew J. Chabrol (Chabrol) from the parking lot of the Virginia Beach apartmant complex where she resided. Appellant told a deputy sheriff that he drove the car in which victim was forcibly taken to Chabrol's house in Chesapeake, where appellant raped her.

Chabrol had been victim's superior in the Navy office at which they worked. Upon information received by persons who resided in victim's Virginia Beach apartment complex, that same morning the police went to Chabrol's house. Upon

being admitted, the police saw appellant seated in the den and observed that Chabrol had fresh lacerations on his chin and a bandage on his knuckles.

Appellant and Chabrol were separately questioned by the police. They gave conflicting statements as to their activities on the night before and the morning of the abduction. Initially, appellant told the police that he and Chabrol had gone to bed prior to midnight on the night before and that neither had left the house on the morning of July 9. Chabrol told the police that they had "stayed up all night playing computer games" and had left the house that morning at 7:00 a.m. to purchase beer. When confronted with Chabrol's statement, appellant changed his story to conform with Chabrol's account, except he claimed that he purchased only juice and Chabrol

did not purchase anything. When appellant was told by the police that they were there only "to find Melissa Harrington," appellant denied having seen "any girls in the house."

The policy request for permission to search Chabrol's residence was refused. A search warrant was then obtained. On that same day at approximately 2:30 p.m., the police found victim's nude, dead body on the floor of the master bedroom. Her body had been wrapped in a blanket, her face taped from her eyebrows to her chin, her head covered by a plastic bag and a rope ligature was tied around her neck.[2] In

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2. Victim also suffered multiple hemorrhages in the muscles of her neck and throat. Due to the strangulation, there were "conjunctival" hemorrhages in the victim's eyes and abrasions on her neck consistent with "fingernail marks." There were abrasions on her wrists and ankles, consistent with being bound; a small laceration on her finger; contusions on the inner surfaces of her lips; small abrasions on her abdomen, right arm and left calf; and electrical burns on her upper left thigh. The ligature around her neck had been (continued...)

the kitchen, the police found two garbage bags, one containing various items belonging to victim, the other containing bed linens and a blanket. The bed in the master bedroom had been made with "fresh linens."

Vaginal swabs taken from victim were analyzed and revealed the presence of seminal fluid and spermatozoa. DNA testing of the sperm was consistant with the DNA of appellant and inconsistent with Chabrol and victim's husband. The likelihood of any black male other than appellant being the source of the sperm was .018 percent, or approximately one in 5,000. If white males were included in the computation, the likelihood that the sperm came from anyone, other than

---

2. (...continued)
tied so tightly that it left a "furrow" when removed. There was also a superficial laceration on the back of victim's head.

appellant, decreased to .0058 percent, or approximately one in 17,000.

The cause of victim's death was "complex asphyxia due to suffocation and strangulation, both ligature and manual."

Upon discovery of victim's body, both Chabrol and appellant were arrested. At 3:45 a.m. on July 10, 1991, at the local jail, appellant made inculpatory statements to Chesapeake Deputy Kevin Knight (Knight). Knight testified that appellant stated that he "was a victim of circumstances," that,

> He stated was only here on vacation. He stated during the abduction he could only drive the car in which they picked her up due to his limited ability. He said he f----- her but on the second time he could not bring himself to do it.

Appellant presented no evidence on his behalf.[3]

Appellant was indicted and charged by the grand jury with having violated Code § 18.2-31 (capital murder). Upon a motion of the Commonwealth, prior to the trial, that indictment was amended by deleting Code § 18.2-31 and substituting Code § 18.2-32 as the offense alleged to have been committed. Also deleted was the allegation in the original indictment that the killing occurred "during the commission of, or subsequent to, rape."

After the Commonwealth rested its case, and during appellant's argument in support of his motion to strike, the Commonwealth further moved the trial court to permit the indictment to be amended

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3. In a separate trial, Chabrol pleaded guilty to the capital murder of victim and was sentenced to death. See Chabrol v. Commonwealth, 245 Va. 327, 427 S.E.2d 374 (1993).

again by adding the phrase "in the commission of rape or abduction." When the Commonwealth agreed that it would "give up any claim . . . to concert of action," appellant consented to the amendment without objection and the trial court approved. We have defined "concert of action" as an "action that has been planned, arranged, adjusted, agreed on and settled between the parties acting together pursuant to some design or scheme." Rollston v. Commonwealth, 11 Va. App. 535, 542, 399 S.E.2d 823, 827 (1991)(quoting Black's Law Dictionary 262 (5th ed. 1979)). All participants in such planned enterprises may be held accountable for incidental crimes committed by another participant during the enterprise even though not originally or specifically designed. Id.; see also

Brown v. Commonwealth, 130 Va. 733, 738, 107 S.E.2d 809, 811 (1921).

The amended indictment provided:

> The Grand Jury charges that:
> On or about July 9, 1991, in the City of Chesapeake Virginia, the accused, STANLEY JUSTIN BERKELEY, did maliciously kill and murder Melissa Harrington, in the commission of rape or abduction, in violation of Section 18.2-32 of the Virginia Code.

Following the trial court's approval of the amended indictment, appellant contended that the evidence failed to show either who killed victim or that appellant was in any way connected to the killing. He further argued that, because the Commonwealth had agreed not to contend that the murder occurred by "concert of action," the record must contain evidence that appellant was either the

perpetrator,[4] a principal in the second degree,[5] or an accessory before the fact.[6]

Although no evidence identified the actual perpetrator, direct, uncontradicted evidence in the record established that at 6:20 a.m., on July 9, 1991, appellant abducted victim and drove her to Chabrol's house in Chesapeake. No evidence was presented that appellant or victim left that house before the police found her nude, dead body in the master bedroom of

---

4. To learn who killed victim, we would have to consult the record in Chabrol, supra note 3, published after appallant's trial.

5. Although "[a] principal in the second degree is equally accountable and is subject to the same punishment as the actual perpetrator," Ramsey v. Commonwealth, 2 Va. App. 265, 269, 343 S.E.2d 465, 468 (1986), no evidence established that appellant was present at the time of the killing, aiding and abetting in the commission of the crime, requirements necessary to support a principal in the second degree conviction. Id.

6. The record fails to show directly that appellant shared the criminal intent of the killer or that appellant intended to incite or aid in the commission of the crime, requirements to support his conviction as an accessory before the fact. Cirios v. Commonwealth, 7 Va. App. 292, 298, 373 S.E.2d 164, 167 (1988).

that same house. Direct evidence established that, between 6:20 a.m. and approximately 9:30 a.m. on that same day, appellant raped victim. Although no direct evidence proved that appellant strangled victim or that he applied the Taser unit, taped her breathing facilities, or tied the ligature around her neck, sufficient circumstantial evidence was presented from which the fact finder could reasonably infer that the killing occurred within the res gestae of the abduction.

No reasonable hypothesis contained in this record supports even a remote possibility of appellant's innocence.

> "Whether the Commonwealth relies upon either direct or circumstantial evidence, it is not required to disprove every remote possibility of innocence, but is, instead, required only to establish guilt of the accused to the exclusion of a reasonable doubt."

Cantrell v. Commonwealth, 7 Va. App. 269, 289, 373 S.E.2d 328, 338 (1988)(quoting Bridgeman v. Commonwealth, 3 Va. App. 523, 526-27, 331 S.E.2d 598, 600 (1986)). Here, every reasonable hypothesis of innocence has been excluded. The abduction, rape, and murder all concurred to form an unbroken chain that links appellant to those crimes beyond a reasonable doubt. See Bishop v. Commonwealth, 227 Va. 164, 169, 313 S.E.2d 390, 393 (1984); Boothe v. Commonwealth, 4 Va. App. 484, 492, 358 S.E.2d 740, 745 (1987).

We need only to decide whether the felony-murder elements were proved beyond a reasonable doubt:

> The rule which we adopt, therefore, consistent with the weight of authority elsewhere, is that the felony-murder statute applies where the killing is so closely related to the felony in time, place, and

> causal connection as to make it a part of the same criminal enterprise.

Haskell v. Commonwealth, 218 Va. 1033, 1043-44, 243 S.E.2d 477, 483 (1978). In Haskell, four defendants unsuccessfully attempted to rob William M. Kantor (Kantor). When nothing of value was found on Kantor, the robbers attempted to abandon the criminal venture and leave the scene. Having been assaulted and battered by one of the robbers, Kantor attempted to foil their escape and was shot and killed by one of the participants in the attempted robbery. Haskell was not the killer. Haskell unsuccessfully argued that the felony-murder doctrine could not be applied because the venture had been concluded and the robbers were attempting to leave the crime scene. He contended that the killing did not occur during the commission of a felony. The Court

rejected that argument and found that the killing was so closely related to the felony in "time, place and causal connection" as to make it a part of the same criminal enterprise, and within the res gestae so as to support the felony-murder charge. Id.

In King v. Commonwealth, 6 Va. App. 351, 356, 368 S.E.2d 704, 706 (1988), we noted that the Haskell Court did not elaborate upon the deqree of causal connection required to support a felony-murder conviction. Based upon the purpose intended by the legislature when it adopted the felony-murder doctrine by statute, we hold that any degree of causation is sufficient.

> The [felony-murder] doctrine was developed to elevate to murder a homicide committed during the course of a felony by imputing malice to the killing. . . . The justification for imputing malice was the theory that the

> increased risk of death or serious harm occasioned by the commission of a felony demonstrated the felon's lack of concern for human life. The purpose of the doctrine was to deter inherently dangerous felonies by holding the felons responsible for the consequences of the felony, whether intended or not. While the range of felonies which may be a predicate for the felony-murder conviction has changed, the function of the doctrine is still to elevate to murder a homicide resulting from a felony by imputing malice.

Spain v. Commonwealth, 7 Va. App. 385, 393-94, 373 S.E.2d 728, 732-33 (1988) (citation omitted).

Evidence in this record establishes appellant's guilt of both the rape and the abduction beyond a reasonable doubt. Abduction is a continuing offense. See Brown v. Commonwealth, 230 Va. 310, 313, 337 S.E.2d 711, 713 (1985). Sufficient evidence exists from which the fact finder

could reasonably infer that the abduction continued to the time of victim's death.

> [W]hen the homicide is within the res gestae of the initial felony and is an emanation thereof, it is committed in the perpetration of that felony. Thus, the felony-murder statue [sic] applies where the initial felony and the homicide were parts of one continuous transaction, and were closely related in point of time, place, and causal connection.

Haskell, 218 Va. at 1041, 243 S.E.2d at 482; see also Talbert v. Commonwealth, _____ Va. App. ____, ____, 436 S.E.2d 286, 289-90 (1993). The continuation of events "covered by the term res gestae depends upon the circumstances of each particular case." Cluverius v. Commonwealth, 81 Va. 787, 805 (1886)(citation omitted). Res gestae, a principle generally associated with an exception to the hearsay evidence rule, pertains not only to what is said but to what is done as well. See Ward v.

White 86 ___ 212, 217, 9 S.E. 1021, 1022-23 (1889); Williams v. Commonwealth, 85 Va. 607, 613, 8 S.E. 470, 473 (1889). The res gestae of the underlying crime begins where an indictable attempt to commit the felony is reached, see Bizup v. People, 371 P.2d 786, 788 (Colo.), cert. denied, 371 U.S. 873 (1962), and ends where the chain of events between the attempted crime or completed felony is broken. Payne v. State, 406 P.2d 922, 924-25 (Nev. 1965); see also 40 Am. Jur. 2d Homicide § 73 (1994).

Here, appellant began his criminal venture by abducting victim and enlarged that venture by raping her. This record contains evidence from which the fact finder could reasonably infer that the abduction continued until victim's death, and thus, the homicide occurred as a part of the res gestae of the criminal venture.

> It has been justly said that the affairs of men consist of a complication of circumstances so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstance, and in its turn becomes the prolific parent of others; and each during its existence, has its inseparable attributes and its kindred facts materially affecting its character, and essential to be known in order to a right understanding of its nature. These surrounding circumstances constituting a part of the res gestae may always be shown to the jury in connection with the principal fact.

Davis v. Franke, 74 Va. (33 Gratt.) 413, 420 (1880).

We hold that victim's murder stemmed from the commission of the felony of abduction, was a part of one continuous transaction, closely related in point of time, place and causal connection, and

occurred within the res gestae of the initial felony. Accordingly, the judgment of the trial court is affirmed.

Affirmed.

BENTON, J., dissenting.

Although the majority recognized that the Commonwealth's Attorney agreed at trial of this case that the Commonwealth would "give up any claim . . . to concert of action," the majority holds that the Commonwealth was not precluded from prosecuting Stanley Justin Berkeley for felony-murder under Code § 18.2-32. I disagree with the majority's holding.

Because of its stipulation, the Commonwealth was required to prove that Berkeley actually committed the murder, i.e., was the principal in the first degree. See Johnson v. Commonwealth, 220 Va. 146, 150, 255 S.E.2d 525, 527 (1979)("only the person who is the immediate perpetrator may be a principal in the first degree"). The principle underlying a felon's liability as a

principal in the second degree under the felony-murder doctrine is based upon a concert of action theory. Because the record is devoid of proof beyond a reasonable doubt that Berkeley killed the victim, I would hold that the Commonwealth failed to prove the stipulated theory upon which it prosecuted Berkeley, and I would reverse his conviction.

The grand jury returned a capital murder indictment charging that Berkeley "willfully, deliberately and with premeditation kill[ed] and murder[ed] Melissa Harrington during the commission of, or subsequent to, rape in violation of [Code §] 18.2-31." At the conclusion of the Commonwealth's evidence at trial, the indictment was amended to read that Berkeley "maliciously kill[ed] and murder[ed] Melissa Harrington in the commission of rape or abduction." In

amending the indictment to charge felony-murder, the Commonwealth's Attorney stipulated that he would not assert that there was "concert of action" between Berkeley and Andrew Chabrol, the co-defendant.

The jury was not instructed that it could find Berkeley guilty of murder if the victim died during the occurrence of the abduction. Nothing in the record explains that omission. The jury was instructed that it could find Berkeley guilty of murder only if the victim died during the occurrence of the rape. No evidence proved, however, that Berkeley was the person who actually killed the victim. Indeed, Andrew Chabrol pleaded guilty to capital murder of the victim. See Chabrol v. Commonwealth, 245 Va. 327, 427 S.E.2d 374 (1993).

A defendant may be "a principal in the second degree [to a felony-murder] and, as such, criminally responsible for the consequences of his conduct 'as if a principal in the first degree.'" Heacock v. Commonwealth, 228 Va. 397, 403, 323 S.E.2d 90, 94 (1984). A person's culpability as a principal in the second degree arises from the concept that "[d]ue to the concert of action, [the principal in the second degree] is deemed to have shared [the principal in the first degree's] intent." Riddick v. Commonwealth, 226 Va. 244, 248, 308 S.E.2d 117, 119 (1983). At best, the evidence proved only that Berkeley was a principal in the second degree to the act of felony-murder perpetrated by Chabrol.

On this appeal, the Commonwealth argued in its brief that "[concert of action] has nothing to do with felony-

murder." The Commonwealth also argued that "under the felony-murder theory, . . . [proof of] 'concert of action' and 'shared intent' [is] not required." The Commonwealth further asserted that concert of action is only relevant if the Commonwealth had been attempting to convict Berkeley of murder as a principal in the second degree. Thus, the Commonwealth asserts that "[t]his appeal, then, reduces itself to the self-answering question of whether the evidence was sufficient to prove that the homicide was within the res gestae of the predicate felonies that Berkeley clearly committed."

This argument ignores the absence of proof that Berkeley acted as a principal in the first degree to the murder. The Supreme Court of Virginia has rejected the "proximate cause theory of liability" as the basis for criminal responsibility in

felony murder cases. See Wooden v. Commonwealth, 222 Va. 758, 763-65, 284 S.E.2d 811, 814-16 (1981). As it argued unsuccessfully in Wooden, the Commonwealth again argues in this Court a theory that would premise an aider and abettor's liability in a felony-murder case upon proximate cause.

The majority opinion apparently adopts the Commonwealth's arguments but also goes further and "hold[s] that any degree of causation is sufficient." (Emphasis added.) That holding is in direct conflict with Wooden. See id. at 763-65, 284 S.E.2d at 814-16. Moreover, the majority invokes Berkeley's participation in the abduction as a sufficient degree of causation to uphold this conviction. The record reflects, however, that the jury was instructed on felony-murder as follows:

> The Court instructs the jury that the defendant is charged with the crime of first degree murder. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:
>
> (1) That Melissa Harrington was killed;
>
> (2) That the killing was malicious; and
>
> (3) That the killing occurred in the commission of rape in which the defendant participated.
>
> If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty . . . .

Thus, even though the jury was not instructed that abduction could be the predicate offense that would support a conviction of felony-murder, the majority finds that the "record contains evidence from which the fact finder could reasonably infer that the abduction

continued until victim's death, and thus, the homicide occurred as a part of the res gestae of the criminal venture." This reasoning improperly premises Berkeley's criminal liability upon a theory that was not submitted to the jury. Dunn v. United States, 442 U.S. 100, 106 (1979) ("To uphold a conviction on a charge that was [not] . . . presented to a jury at trial offends the most basic notions of due process."). "It is as much a violation of due process to send an accused to prison following a conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." Cole v. Arkansas, 333 U.S. 196, 201 (1948).

Felony-murder is codified in Virginia under Code § 18.2-32 and retains the

common law elements of murder.[7] In Wooden the Virginia Supreme Court defined felony-murder as follows:

> Where a person maliciously engages in criminal activity, such as robbery, and homicide of the victim results, the malice inherent in the robbery provides the malice prerequisite to a finding that the homicide was murder. And, all of the criminal participants in the initial felony may be found guilty of the felony-murder of the victim so long as the homicide was within the res gestae of the initial felony.

222 Va. at 762, 284 S.E.2d at 814.

Felony-murder was initially developed as a means to elevate a homicide committed during the course of a felony to murder. King v. Commonwealth, 6 Va. App. 351, 354, 368 S.E.2d 704, 705-06 (1988). Murder is distinguished from other killings by the

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7. **Felony-murder is also codified under Code § 18.2-33 as the killing of one accidently while in the prosecution of some felonious act other than those specified in Code §§ 18.2-31 and 18.2-32.**

presence of malice aforethought. In order to find a felon guilty for a murder committed during a felony, it is necessary that this mens rea is present by the person who actually causes the death. See Wooden, 222 Va. at 765, 284 S.E.2d at 816. Malice is imputed to the felon who causes a death from his intent to commit the felony. Id. at 762, 284 S.E.2d at 814. If the felon charged with felony-murder is not the actual parpetrator of the homicide, malice is imputed from the perpetrator of the killing to the cofelon charged with felony-murder. See id.; Commonwealth ex rel. Smith v. Myers, 261 A.2d 550, 553, 555 (Pa. 1970).

There are several different theories of felony-murder liability which state courts have adopted. See John S. Anooshian, Note, Should Courts Use Principles of Justification and Excuse to

Impose Felony-Murder Liability? 19 Rutgers L.J. 451, 459-62 (1988). The majority viewpoint, which Virginia follows, is an agency theory. Under that theory, liability lies "only where the act of killing is 'either actually or constructively committed' by a felon 'or by someone acting in concert with him or in furtherance of a common design or purpose.'" Id. at 461-62 (citation omitted); Wooden, 222 Va. at 763-65, 284 S.E.2d at 815. See also Commonwealth v. Redline, 137 A.2d 472, 478-79 (Pa. 1958).

The facts of Wooden illustrate this idea. Wooden and three other persons joined to commit a robbery. Wooden's co-felon shot the victim of the robbery. Before the victim died, the victim shot and killed Wooden's co-felon. Wooden was convicted of two felony-murders. She appealed from the conviction of felony-

murder that grew out of the death of her co-felon. 222 Va. at 760, 284 S.E.2d at 812-13. Citing Pennsylvania's long history of case decisions on the felony-murder doctrine and relying upon the principles developed in those decisions, the Supreme Court of Virginia reversed Wooden's conviction and held that a criminal participant in a felony cannot be convicted of felony-murder when a co-felon is killed by the victim of the initial felony. Id. at 765, 284 S.E.2d at 816. The Court reasoned that because no evidence proved that the victim killed the co-felon with malice, malice cannot be imputed to Wooden under the felony-murder rule.[8] Id. at 762, 284 S.E.2d at 814.

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8. The Court cited both Commonwealth v. Redline, 137 A.2d 472 (Pa. 1958), and Commonwealth ex rel. Smith v. Myers, 261 A.2d 550 (Pa. 1970), in its holding that a participant in a felony may not be convicted of the felony-murder of a co-felon killed by the victim of the initial felony. The rational employed in each case is (continued...)

For felony-murder prosecutions in states, such as Virginia, that follow the agency theory liability turns upon the intent of the perpetrator of the killing. To uphold a conviction, "the killing must have been done by the defendant or an accomplice or confederate or one acting in furtherance of the felonious undertaking." Haskell v. Commonwealth, 218 Va. 1033, 1042, 243 S.E.2d 477, 482 (1978)(citing Commonwealth ex rel. Smith v. Myers, 261 A.2d 550, 555 (Pa. 1970)). As a result, a felon can only be guilty of felony-murder in Virginia if a death results from the

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8. (...continued)
different. Redline's holding is based on a justifiable homicide theory. In Redline, a police officer shot and killed a robber. The court held that a felon cannot be liable for the murder of the lawful conduct of another, since it was justifiable homicide. Id. at 483. Thus, liability depended upon state of mind of the victim. Myers, the more recent of the two cases, reaffirmed an old concept based upon an agency theory--liability will only lie when the killing is done by one acting in furtherance of the felony. Id. at 555, 559-60.

felon's own act or from the act of a person acting in concert with the felon in connection with the underlying felony.

A contrary theory, which Virginia has rejected, is the view that a felon is guilty of any homicide resulting from the commission of a felony whenever the evidence proves that the felony is the proximate cause of the homicide. See Wooden, 222 Va. at 764, 284 S.E.2d at 815. In other words, in Virginia a felon may not be convicted of felony-murder if the actual killing was committed by the police or the victim or by some other person not acting in concert with the felons. Id.

In disregarding the principle that a principal in the second degree's liability for felony-murder is based upon concert of action, the majority resurrects the proximate cause rationale. The majority believes that it is unnecessary to prove

concert of action for a felony-murder conviction to stand. The majority's disregard of Berkeley's argument that concert of action is inherent in applying the doctrine of felony-murder to a principal in the second degree manifests an erroneous view that malice imputed to the felon charged with felony-murder need not flow through the killer but rather arises solely through the principle of proximate cause. In that way, a felon may always be guilty of the felony-murder of a killing done by anyone, as long as proximate cause is found. Wooden has addressed and rejected that theory.

The issue squarely presented in this case is whether concert of action is subsumed within the felony-murder doctrine when an aider and abetter is prosecuted. In Virginia, the standard jury instruction defining concert of action is as follows:

> If there is concert of action with the resulting crime one of its incidental probable consequences, then whether such crime was originally contemplated or not, all who participate in any way in bringing it about are equally answerable and bound by the acts of every other person connected with the consummation of such resulting crime.

Rollston v. Commonwealth, 11 Va. App. 535, 543, 399 S.E.2d 823, 827 (1991).

Our cases also hold that transferred intent occurs "if an accused shoots at another intending to kill him, and a third person is killed because of the act, that same intent follows the bullet and is transferred to the killing of the third person, even if such death was accidental or unintentional." Riddick v. Commonwealth, 226 Va. 244, 248, 308 S.E.2d 117, 119 (1983). Thus, if two people act in concert in the commission of a felony, and one felon shoots a person, that

felon's intent is transferred and shared with the other felon as a principal in the second degree. Id. See also Epps v. Commonwealth, 216 Va. 150, 156, 216 S.E.2d 64, 69 (1975). It follows, therefore, that a co-felon who is not the actual killer may be charged with felony-murder as a principal in the second degree under a concert of action theory. Indeed, this Court has specifically upheld the giving of a concert of action instruction in a felony-murder trial where the defendant was not the actual killer. See Rollston, 11 Va. App. at 543, 399 S.E.2d at 828. See also People v. Brown, 328 N.W.2d 380, 383 (Mich. Ct. App. 1982) (where there is evidence of concert of action, an aiding and abetting jury instruction is proper in a felony-murder case).

Code § 18.2-18 is explicit in stating that "[i]n the case of every felony, every principal in the second degree and every accessory before the fact may be indicted, tried, convicted and punished in all respects as if a principal in the first degree; . . . except in the case of a killing for hire. . . ." In Heacock v. Commonwealth, 228 Va. 397, 403-04, 323 S.E.2d 90, 94 (1984), the Supreme Court affirmed Heacock's conviction for felony-murder under Code § 18.2-33. The Court found immaterial Heacock's contention that the evidence failed to show that he administered the fatal injection. The Court ruled that Heacock was a principal in the second degree because he was aiding and abetting in the preparation of the narcotics and, as such, was equally as guilty as a principal in the first degree. Id. Relying upon Heacock, this Court in

Hickman v. Commonwealth, 11 Va. App. 369, 373, 398 S.E.2d 698, 700 (1990), aff'd, 242 Va. 263, 410 S.E.2d 88 (1991), held that the defendant's participation as a principal in the second degree in the decedent's ingestion of cocaine was sufficient to support his conviction under the felony-murder doctrine. See also Rollston, 11 Va. App. at 548, 399 S.E.2d at 830-31.

Because Virginia's law on felony-murder liability for a felon who was not the actual killer is based upon a concert of action theory, I believe the Commonwealth was barred from convicting Berkeley under Code § 18.2-32 after it agreed to forego proceeding under a concert of action theory. Due process encompasses "a fundamental sixth amendment concern that guilt be initially adjudicated before a jury based on the

government's case as presented at trial." Cola v. Reardon, 787 F.2d 681, 697 (1st Cir.), cert. denied, 479 U.S. 930 (1986). Thus, I dissent from the majority's holding.

VIRGINIA:

In the Court of Appeals of Virginia on Friday *the* 14th *day of* May, 1993.

Stanley Justin Berkeley, Appellant,

against Record No. 1680-92-1
Circuit Court Nos. 91-2309 through 91-2311

Commonwealth of Virginia, Appellee.

From the Circuit Court
of the City of Chesapeake

Before Judge Baker,
Retired Judges Hodges and Godwin*

This petition for appeal is granted in part and denied in part. And an appeal is awarded to the petitioner from judgments of the Circuit Court of the City of Chesapeake, dated September 8, 1992, with respect to the following question:

Whether the evidence was sufficient to convict appellant of first degree murder.

Appeal bond or an irrevocable letter of credit in the amount of $500 shall be posted as required by Code § 8.01-676.1(B). The clerk is directed to certify this action to the trial court and to all counsel of record.

Pursuant to Rule 5A:25, an appendix is required in this appeal and shall be filed by the appellant at the time of the filing of the opening brief.

The remainder of the petition for appeal is denied for the following reasons:

Appellant raises four additional issues on appeal: (1) whether there was probable cause to arrest appellant; (2) whether the trial court erred in admitting into evidence certain statements volunteered by appellant (although he had previously requested an attorney) to a sheriff's deputy during the booking process; (3) whether the trial court erred

in admitting certain photographs of the decedent; and (4) whether the trial court erred in failing to admit into evidence the co-defendant's voluntary plea of guilty to capital murder.

"The fourth amendment permits an officer who has probable cause to make a warrantless arrest . . . Accordingly, probable cause is the standard for testing the constitutional validity of the arrest . . . '"[T]he test of constitutional validity is whether at the moment of arrest the arresting officer had knowledge of sufficient facts and circumstances to warrant a reasonable man in believing that an offense has been committed."'" Penn v. Commonwealth, 13 Va. App. 399, 407-08, 412 S.E.2d 189, 194 (1991) (quoting DePriest v. Commonwealth, 4 Va. App. 577, 583-84, 359 S.E.2d 540, 543 (1987), cert. denied, 488 U.S. 985 (1988)). In this case, the police obtained information that the

decedent was abducted from her home. Thereafter, the police went to the home of a man (co-defendant) whom they knew the decedent had worked for and had filed a sexual harassment complaint against. The police found appellant sitting in the co-defendant's den. The policy then obtained conflicting statements from appellant about his and the co-defendant's whereabouts that morning. Furthermore, after securing a search warrant, they found decedent's body in the house which appellant was occupying. We find this evidence sufficient to warrant a probable cause arrest and find that all evidence derived from the arrest as properly admitted.

At the suppression hearing appellant moved to suppress the statements made to the deputy sheriff after the deputy told the appellant he would keep those statements confidential. The trial court

suppressed those statements. Appellant did not raise the issue that the statements made by appellant were a product of a custodial interrogation. This Court will not consider issues on appeal which were not presented to the trial court for its consideration. Rule 5A:18; Westbrook v. Westbrook, 5 Va. App. 446, 451, 364 S.E.2d 523, 526 (1988).

"'The admission of photographs is a matter within the sound discretion of a trial court,' Gray v. Commonwealth, 233 Va. 313, 342, 356 S.E.2d 157, 173 (1987), and the court's decision will be upheld unless an abuse of discretion is shown. See Lugo v. Joy, 215 Va. 39, 41, 205 S.E.2d 658, 660 (1974)." Cook v. Commonwealth, 7 Va. App. 225, 231, 372 S.E.2d 780, 784 (1988). We find that the trial court did not abuse its discretion in admitting the photographs.

Upon review of the record, we find that the trial court gave the defense the opportunity to continue the case so that they could get the co-defendant into court to testify. The defense did not take up the court's offer. As such, we find no error in the trial court's refusal to admit the co-defendant's guilty plea.

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*Retired Judges William H. Hodges and James C. Godwin took part in the consideration of this case by designation pursuant to Code § 17-116.01.

A Copy,

Teste:

Patricia G. Davis, Clerk

By:

Deputy Clerk